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In the Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

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Respondents obscure the legal issues presented for review by largely ignoring the decisions of the court of appeals and agency. Instead, they present an array of facts selectively drawn from the record. These facts either are irrelevant or were determined by the Administrator not to be reliable indicators that the passive restraint requirements of Standard 208 would be effective. This Court does not ordinarily sift an extensive and complex administrative record to determine whether the agency has correctly weighed and analyzed the facts, and there is no reason for the Court to do so here.

Although the experience of the NHTSA's and Congress's consideration of passive restraints has been extensive and controversial, and the factual, predictive, and technical aspects of the question have been complex, variable, and sometimes contradictory, a detailed analysis of these matters is not necessary in order to expose the fundamental flaws in the court of appeals' unprecedented legal holdings. To the contrary, the reasonableness of the agency's decision is most fully understood when the case is stripped to its essentials. We therefore begin by focusing again on those essentials.

1. a. The Administrator of NHTSA was confronted in 1981 with a safety standard, scheduled to go into effect in the very near future, requiring the installation of passive occupant restraints in all newly manufactured automobiles. After soliciting comments and taking a fresh look at the standard and the industry compliance efforts it had spurred, the Administrator determined that the manufacturers in fact planned to comply with the standard by installing passive belts that could be permanently detached by the simple act—consuming only a second or two of time—of releasing a latch mechanism. Once detached in this fashion, the belts installed under the standard would be functionally identical to the manual belts required in new cars since 1967 (32 Fed. Reg. 2408, 2415), because they then would require the same affirmative conduct of "buckling up" by the occupant as

is required in order for manual belts to afford occupant protection. This similarity to manual belts was all the more troubling because the use of manual belts had actually declined significantly in recent years.[1]

The Administrator had substantial doubts that belts so readily detachable would be used significantly more often than manual belts (Pet. App. 99a, 101a, 104a, 113a), and he concluded that the anticipated $1 billion annual cost of the passive restraint requirement was not justified in the face of this substantial uncertainty (*id.* at 105a-107a, 115a, 117a). The Administrator also determined that going forward with the requirement under these circumstances could actually be counterproductive from a safety standpoint, because public attitudes toward passive restraints and safety initiatives generally could be poisoned by requiring a system that could prove to be of virtually no marginal benefit (*id.* at 107a-109a, 114a-115a). He therefore rescinded the particular mandatory passive restraint provisions embodied in Standard 208.

At the same time, the Administrator reiterated NHTSA's commitment to the goal of fostering automatic crash protection systems that will actually produce substantial safety benefits and to the continuing examination of other ways of improving occupant protection and fostering public acceptability in order to prepare the way for possible introduction of more effective passive restraint devices in the future (Pet. App. 107a-112a, 114a, 116a). Insurance companies like respondent State Farm would of course have nothing to lose if NHTSA had nonetheless permitted the passive restraint requirement to go into effect in the hope that it might in fact lead to

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[1] As the court of appeals observed (Pet. App. 14a), NHTSA estimated in 1977 that usage of manual belts was approximately 20% (42 Fed. Reg. 34290), but concluded in 1981 that the usage rate of such belts had declined to 11% (46 Fed. Reg. 53422).

some incremental gain in belt usage;[2] viewed from the broader perspective of the Nation as a whole, however, we do not see how NHTSA's rescission of the requirement could be viewed as anything other than sound and responsible.

b. Respondents attempt to deal with the Administrator's conclusions by suggesting that NHTSA should have amended Standard 208 to prohibit compliance by means of detachable belts—the means of compliance planned by virtually the entire industry—because of doubts about their utility. Insofar as they urge this solution, however, respondents *concede* that there was substantial uncertainty whether Standard 208 as it then stood should have been permitted to go into effect. Indeed, respondents' argument in this respect vividly illuminates the central reality of the situation as it stood in 1981—that there was significant doubt whether the 1977 solution to this infinitely complex problem was a sensible and effective one.

At this point, then, respondents' case depends on the proposition that it was arbitrary and capricious for the Administrator to rescind the passive restraint requirement of Standard 208 *before* turning to the question whether an alternative version of it—one prohibiting detachable belts—should be adopted. But no such proposition can seriously be maintained; the Administrator's discretion must surely include the option to rescind an ineffective regulatory solution before canvassing alternatives to it.

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[2] As NHTSA found (Pet. App. 106a), State Farm and many other insurance companies had not offered discounts for vehicles equipped with passive belts, pending an assessment of their effectiveness under a mandatory standard (see, *e.g.*, C.A. App. 1241-1242, 2550-2551). These companies have no hestitation, however, in asserting that *others*—automobile purchasers and manufacturers—should assume a financial burden in these same uncertain circumstances (State Farm Br. 39-42).

c. Respondents also ignore the fact that the agency action at issue here is but the most recent in a long line of varying administrative decisions rendered as NHTSA has grappled with the occupant restraint issue over the years. The requirement rescinded by the Administrator in 1981 had been adopted in 1977 by Secretary Adams, who in turn had reversed a decision rendered just six months earlier by then-Secretary Coleman *not* to require passive restraints because of his judgment that there would be widespread public resistance to such a standard at that time (Pet. App. 10a). Secretary Coleman's decision in turn was a departure from the Department's prior position, reflected in NHTSA's promulgation in 1972 of a standard that would have required installation of passive restraints in new cars. See Gov't Br. 3-5. Thus, the administrative history of passive restraints has been marked by frequent changes in direction by successive Secretaries of Transportation or Administrators of NHTSA, based on changed circumstances and differing assessments of the relevant circumstances.

Until the decision in this case, the courts of appeals had recognized the broad discretion of NHTSA to revise its approach to the occupant restraint problem in this manner. The Sixth Circuit, in sustaining the Secretary's initial decision to require passive restraints in 1972, made it clear that the matter was one within the Secretary's "administrative discretion" (*Chrysler Corp.* v. *Department of Transportation*, 472 F.2d 659, 674 (1972)) and stressed that if it appeared as the time for implementation approached that further testing or development was necessary, NHTSA was free to consider "whether to extend the time for implementation or to alter, or even to abandon, the project" (*id.* at 673).[3]

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[3] Although the court upheld the Secretary's authority to require passive restraints, it invalidated the particular standard at issue on the ground that it did not satisfy the statutory requirement that a standard be stated in objective terms. 472 F.2d at 675-678; see 15 U.S.C. 1392(a).

Similarly, in sustaining Secretary Adams' 1977 decision to reimpose the passive restraint requirement, the District of Columbia Circuit held that the proper standard of review was whether the Secretary's decision was "rational" and whether he had "abused his discretion" in assessing the relative benefits and detriments of airbags, which were then expected to be installed in 75% of all new vehicles. *Pacific Legal Foundation* v. *Department of Transportation*, 593 F.2d 1338, 1340 n.6, 1343, 1346-1347 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979). The court also held that the Secretary is required by the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381 *et seq.* ("Safety Act") to consider the possible public reaction to passive restraints,[4] and viewed the estimate of public resistance as a matter of "judgment" for the Secretary (593 F.2d at 1346; see Secretary Coleman's 1976 Decision, C.A. App. 2119-2124).[5]

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[4] NAII's objection (Br. 32-34) to NHTSA's consideration of the public's reaction to the passive restraint requirement therefore is without merit.

[5] The court concluded that Secretary Adams had sufficiently explained why his judgment about the prospect of substantial adverse public reaction differed from the contrary judgment of Secretary Coleman just six months earlier; but the court did not suggest that Secretary Coleman's view that substantial public resistance would result--a view shared by the Administrator in this case—was in any way irrational (593 F.2d at 1342). Secretary Coleman, like the Administrator in the instant case, had reasoned that "[t]he issue of public acceptance deserves considerable weight in this decision because the consequences of a mistaken judgment are particularly severe" (C.A. App. 2120). Secretary Coleman believed, again like the Administrator here, that the experience with the ignition interlock systems mandated by the Department in 1973 and outlawed by Congress in 1974 demonstrated that actions requiring particular restraint systems may be judged as intolerable by the public (C.A. App. 2119). Secretary Adams, in contrast, had reasoned that public acceptability was not even a factor that was required to be considered under the Safety Act, a position flatly rejected by the court of appeals (593 F.2d at 1345-1346; see also note 11, *infra*), but the court nevertheless concluded that Secretary Adams had adequately explained why his judgment regarding public acceptability differed from that of Secretary Coleman:

Despite this background of experimental and shifting administrative positions reflecting the developmental nature of the problem, and the prior judicial decisions recognizing that the question whether to institute mandatory passive restraints presents questions of expert judgment and discretion for NHTSA, the court of appeals in this case intervened to freeze this evolution at the point of Secretary Adams' decision of almost six years ago. The court held that NHTSA's substantial uncertainty about the efficacy of the mandatory passive restraint standard promulgated in 1977 was not a sufficient reason for NHTSA to withdraw that standard. It insisted instead on affirmative proof by the agency that usage rates would *not* increase by an amount that would make the standard worthwhile, even though there is a conceded absence of any experience with the types of belts that would be installed under the standard that could form the basis for such a showing. With all respect, by reversing the respective roles of agency and court in this manner, it was the court of appeals, not NHTSA, that acted in an arbitrary and capricious manner.

2. a. Not surprisingly, respondents have sought to disassociate themselves from most of the court of appeals' reasoning. As an initial matter, respondents make no attempt to defend the court of appeals' unprecedented holding that the scope of discretion originally granted to NHTSA by the Safety Act to regulate in the area of occupant restraints—and in particular to revoke a passive restraint standard—was somehow constricted by subsequent legislative reaction to the passive restraint issue that the court itself acknowledged did not amount to "positive law" (Pet. App. 46a, 47a, 48a; see generally *id.* at 32a-46a). To the contrary, State Farm notes its agreement with our submission (Gov't Br. 46-47) that this

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Secretary Adams was of the view that the adverse reaction to the interlock requirement was based on the fact that it required affirmative action (buckling of a seatbelt), while passive restraints do not (593 F.2d at 1342, 1346).

post-enactment legislative history "does not heighten the standard of [judicial] review of NHTSA's actions" (State Farm Br. 13; see also *id.* at 37 n.38), and respondents National Association of Independent Insurers, *et al.* (NAII) likewise agree that it is the text and legislative history of the Safety Act as originally enacted that "define the limits of discretion available to NHTSA" (NAII Br. 45). Respondents thus have conceded that the rationale on which the court of appeals explicitly based its exacting standard of judicial review in this case (see Pet. App. 46a, 47a, 48a) is without merit.

Nor does State Farm or NAII make any effort to answer the detailed submission in our opening brief (Gov't Br. 42-46) that each of the post-enactment legislative incidents relied upon by the court of appeals in fact reflects a continuing and substantial opposition in Congress to a mandatory passive restraint standard, based on the view that it would be expensive and ineffective and constitute an unwarranted or irritating expansion of the regulatory role of government at the expense of personal freedom. This period of activity in Congress was marked by the repeated imposition or proposed imposition of legislative restrictions on the ability of NHTSA to implement a passive restraint standard in the face of strong public resistance (*ibid.*; Pet. App. 8a).[6] Thus, far from support-

[6] State Farm is wrong in asserting (Br. 36-37) that there is nothing in the legislative history of the 1974 amendments to the Safety Act to suggest that Congress' distaste for ignition interlocks extended to other forms of passive restraints. As we explain in our opening brief (Gov't Br. 42), those amendments had their origins in a floor amendment passed by an overwhelming margin that would have barred NHTSA from requiring passive restraints as well as ignition interlocks. 120 Cong. Rec. 27815, 27822-27823 (1974). The provision in the law as eventually enacted for a legislative veto of any imposition of a nonbelt passive restraint standard in the future (15 U.S.C. 1410b(b)(3), (c) and (d)) was a compromise reflecting the fact that such systems, unlike the ignition interlocks that were prohibited by the 1974 amendments (see 15 U.S.C. 1410b(b)(1)), had not yet been installed on a widespread

ing the judgment below, as respondents now only weakly suggest (State Farm Br. 37 n.38; NAII Br. 45), the consistently controversial nature of the issue in the most representative branch of government over the last decade strongly reinforces NHTSA's doubts about the public acceptability of mandatory passive restraints and NHTSA's resulting fears that Standard 208 would lead to a poisoning of popular sentiment toward future efforts to improve occupant restraint systems in particular and safety measures in general (Pet. App. 107a-109a; C.A. App. 2073 (Secretary Coleman's 1976 Decision)).

b. Respondent State Farm also expressly concedes (Br. 12-13, 38) that the burden of proof in this case rested on those challenging NHTSA's decision, not on the agency, and that a regulation may be rescinded if there is substantial uncertainty whether it will work as expected. State Farm thus has effectively acknowledged that the court of appeals' decision must be reversed, because the court of appeals' judgment rests on that court's contrary holding with respect to these two issues (Pet. App. 51a-54a).

NAII likewise eschews reliance on any general principle that substantial uncertainty is an inadequate basis for an agency to rescind a rule. Unlike State Farm, however, NAII attempts to justify the court of appeals' decision placing the burden on NHTSA in this case to prove that its own regulation will not be effective by arguing that NHTSA was reversing an assertedly "'settled course'" that had been followed by the agency for over a decade (NAII Br. 41-42, quoting *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807 (1973)). This argument fails for three reasons.

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basis and that NHTSA had not yet decided whether to mandate them. See Gov't Br. 42-43; 120 Cong. Rec. 27819-27820, 30558, 30837-30839, 30845, 30849, 35637 (1974). Congress' failure to prohibit passive restraints in 1974 therefore scarcely can be viewed as an expression of congressional approval of them.

First, as we have explained above (see page 5, *supra*) and in our opening brief (Gov't Br. 34-35), there plainly has not been a settled administrative course by NHTSA of mandating passive restraints. There has been a repeated changing of course on that question. Second, notwithstanding the rescission of the particular passive restraint requirement adopted in 1977, NHTSA has not abandoned its longstanding commitment to developing automatic crash protection that will be truly effective.[7] Installation of passive restraints continues to be one means by which a manufacturer may comply with Standard 208 (see 49 C.F.R. 571.208, para. S4.1.2.1), and the agency intends to explore ways of increasing the public acceptability of such systems in the future.

Third, even if NHTSA's action were viewed as a departure from a settled administrative course, the Court made clear in *Atchison, T. & S.F. Ry.* v. *Wichita Board of Trade*, *supra*, that an agency may "flatly repudiate [prior] norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy." 412 U.S. at 808. Although an agency must explain its actions in that event (*ibid.*), NHTSA fully did so here.

c. NAII also suggests (Br. 42) that the court of appeals' holding prohibiting NHTSA from modifying or revoking a regulation because of doubts that the regulation would be effective is appropriate under the Safety Act even if such a holding might not be appropriate under other regulatory statutes. This argument is flatly contradicted by the terms of the Safety Act itself. In order for the Secretary to impose a safety standard, he must find that it is "practicable," will "meet the need for motor vehicle safety," and be "reasonable, practicable and ap-

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[7] NHTSA's budget submission to Congress for Fiscal Year 1984 includes a request for more than $7.5 million for research and development in the area of "crashworthiness," which includes occupant restraints. U.S. Department of Transportation, *Budget Estimate, Fiscal 1984 (NHTSA)* 67 (1983). See also Gov't Br. 12 n.12.

propriate" for the particular type of vehicle. 15 U.S.C. 1392(a) and (f)(3); see also 15 U.S.C. 1391(1) and (2).[8] Because of uncertainties regarding the incremental usage rates of detachable belts and the significant possibility of adverse safety consequences, NHTSA was unable to make the requisite affirmative finding that the standard would meet the need for motor vehicle safety.[9] In view of the $1 billion annual cost of the standard, NHTSA likewise could not find that a standard having such speculative benefits would be "reasonable" or "practicable." See Gov't Br. 8-11. The Safety Act simply cannot be read nonetheless to compel the Secretary to institute or retain a safety standard in these circumstances.

NAII ignores these statutory prerequisites for the issuance of a safety standard and relies (Br. 10 n.12, 13, 14, 42) instead on the language of the Act providing that NHTSA "*shall* establish by order appropriate Federal Motor vehicle safety standards." 15 U.S.C. 1392(a) (emphasis added). From this, NAII apparently intends to suggest (Br. 14-16, 27-28 & n.30, 32-34, 35-36, 39-40) that the Secretary has a duty to issue a safety standard—and in particular a passive restraint standard to address the problem of the "second collision" between the occupant and the interior of the vehicle[10]—largely without regard to such factors as public acceptability and cost. See also State Farm Br. 19-20, 29. This argument overlooks the fact that 15 U.S.C. 1392(a), the section which provides that the Secretary "shall" issue safety stand-

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[8] Cf. *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 653 (1980) (opinion of Stevens, J.); 5 U.S.C. 556(d).

[9] The appropriateness of attaching importance to the potentially minimal safety benefits of the standard also is demonstrated by the requirement that the Secretary consider "the *extent* to which such standards will contribute to carrying out the purposes of [the Act]." 15 U.S.C. 1392(f)(4) (emphasis added).

[10] See, *e.g.*, H.R. Rep. No. 1776, 89th Cong., 2d Sess. 10-11 (1966); S. Rep. No. 1301, 89th Cong., 2d Sess. 3 (1966).

ards, is also the section which provides that each such standard "shall" be appropriate, practicable, and meet the need for motor vehicle safety. Thus, respondents' argument regarding the mandatory nature of the word "shall" in 15 U.S.C. 1392(a) only reinforces the conclusion that the Secretary's responsibility for issuing safety standards must be exercised within the limits of cost, public acceptability, and the likelihood of resulting safety benefits that are established by the requirements of appropriateness, practicability, the need for safety, and the other criteria listed in 15 U.S.C. 1392(f).[11]

In addition, it is particularly clear that Congress, in enacting the Safety Act, did not intend to require NHTSA to issue a passive restraint standard. Compare 15 U.S.C. 1392(i). The 1974 amendment to the Act that subjects any future nonbelt passive restraint standard to a legislative veto (15 U.S.C. 1410b(b)(1)) obviously rests on the premises that the Act itself did not mandate such a standard and that whether to issue one remains within the discretion of the agency through application of the ordinary statutory criteria. Furthermore, the legislative history of the 1966 Act indicates that it was contemplated that NHTSA could address the problem of the "second collision" by mandating certain interior design changes as well as seatbelts (S. Rep. No. 1301, *supra*, at 3; H.R. Rep. No. 1776, *supra*, at 10-11); in fact NHTSA has followed this course (see 49 C.F.R. Pt. 571). There also is no indication in the legislative history that Congress had passive restraints in mind when it enacted the Safety Act in 1966. Such technology was largely unknown except in the research community, and it presumably did not become a subject of broad public discussion until after NHTSA published an advance notice of proposed rulemaking in 1969. 34 Fed. Reg. 11148. NAII's efforts to find support in the Safety Act for the burden-

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[11] See S. Rep. No. 1301, *supra*, at 3, 6; H.R. Rep. No. 1776, *supra*, at 16; see also Gov't Br. 19 n.16. The Senate Report (at 3) stresses, for example, that "the public willingness to use safety devices, such as seat belts," is a critical factor.

shifting rule adopted by the court of appeals therefore is without merit.

3. In an effort to salvage the judgment below notwithstanding their admissions that the court of appeals committed a number of legal errors, respondents take issue as a factual matter with NHTSA's determination that there was substantial uncertainty whether usage rates would increase significantly under Standard 208. State Farm Br. 39-42; NAII Br. 18-25. The court of appeals did not disturb this determination, however, acknowledging that there may well be substantial uncertainty about the usage rates that can be predicted if, as NHTSA found, detachable belts would be widely used under the Standard (Pet. App. 51a). This Court need not review this question of administrative judgment. *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *Langnes* v. *Green*, 282 U.S. 531, 537 (1931); cf. *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490, 522-523 (1981).

In any event, the question is not whether the reviewing court might reach a different conclusion than did NHTSA because it is more confident than NHTSA that substantial safety benefits would materialize. The question is whether NHTSA rationally could have believed that sufficient uncertainty existed regarding possible safety benefits to counsel withdrawal of the passive restraint requirement before its compliance date arrived. *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). There can be little doubt that this test is satisfied here.

A sufficient basis for the uncertainty NHTSA found was established by the Administrator's determination that the belts that would be installed under Standard 208 could be permanently detached with ease and thereafter would be functionally identical to the manual belts that had experienced declining usage in recent years.[12] Simply

[12] NAII contends (Br. 25-26) that detachable belts in fact are not functionally identical to manual belts even after they are de-

as a matter of common sense, the Administrator could not be confident that a belt system whose passive feature was so transparently avoidable would, over time, make any significant incremental difference in seat belt usage, much less a difference approaching that necessary to warrant the expenditure of $1 billion annually for such systems.

Respondents contend, however, that NHTSA should have ignored these well-grounded concerns about the marginal utility of detachable belts and predicted a high usage rate for them based on extrapolations from data relating to quite different types of restraints (NAII Br. 18-25; State Farm Br. 39-42). State Farm, for example, cites (Br. 20-21, 39) studies conducted between 1977 and 1981 of usage rates of optional detachable belts in Volkswagen Rabbits that also were equipped with ignition interlocks to compel reconnection of the belts if they were detached. These studies revealed usage rates averaging 84% for the automatic belts, as compared with usage rates of 34% in Rabbits equipped with manual belts. Similar studies of a much smaller number of Chevrolet Chevettes equipped with optional ignition interlocks or belts that were only partially detachable and had a spool-out device for emer-

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tached, because Standard 208 requires that an automatic belt system be accompanied by a flashing or continuous warning light if the belt is detached until it is either reattached or pulled out. 49 C.F.R. 571.208, para. S4.5.3.3. The court of appeals, however, specifically sustained NHTSA's conclusion that a detached belt and manual belt would be functionally identical (Pet. App. 50a). Moreover, the only record evidence NAII cites in support of its argument is a survey of 18 rental cars in Florida in which shoulder belts connected to a continuous light were used 23% of the time as compared with a usage rate of 13% for manual belts that were not so connected (C.A. App. 94-95). However, as NHTSA explained in its July 1, 1982 filing in the court of appeals, a rental car survey may not be reliable because of demographic considerations and the likelihood that drivers would tolerate a novel system for the short period of the rental (Pet. App. 146a). The Florida survey NAII cites itself recognized that it showed only that a use-compelling feature can "have an effect on first time usage of a system" (C.A. App. 94). This isolated survey showing only a 10% increase in usage therefore is of little significance here.

gency egress recorded a usage rate of between 67% and 72%, as compared with a usage rate of 11% for manual belts in such cars. See Pet. App. 18a-20a & nn. 12-14, 95a-96a; C.A. App. 85-93, 108, 824, 871, 922, 1012. As NAII concedes (Br. 20), however, NHTSA devoted "considerable attention" to these studies. After doing so, it concluded that the available data were of "limited utility in attempting to make any reliable predictions about the usage of easily detachable automatic belts" (Pet. App. 97a). Its reasons for reaching this conclusion were, at the very least, not irrational.

NHTSA determined that the most important factor causing the higher usage rates in the vehicles involved in the studies was that the detachable belts in the Rabbits and Chevettes were equipped with an interlock to compel reattachment and that the remaining Chevette belts were not even fully detachable in the first place. Based on prior data, not contested by respondents, concerning the use of belts in the model year 1974 and 1975 automobiles that were required to have interlocks under Standard 208 until that requirement was overturned by statute in 1974, NHTSA estimated that these features probably accounted for four-fifths of the difference between the usage rates of manual and passive belts in Rabbits and Chevettes (Pet. App. 102a). Indeed, common sense alone would have suggested that the higher usage rates of detachable belts equipped with an interlock would be principally attributable to the fact that the car could not even be started without reconnecting the belt, and that passive belts that were not detachable would be used far more often than those that were. These critical differences between the optional belts studied and those that would have been installed to comply with the passive restraint requirement of Standard 208 thus formed a sufficient basis for NHTSA's determination not to view the Rabbit and Chevette studies as compelling it to permit that requirement to go into effect.[13]

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[13] NHTSA offered several other sound reasons for distinguishing Rabbit and Chevette studies: (i) the Rabbits and Chevettes were

NAII makes no attempt to show that NHTSA's principal explanation for the higher usage rates in the specially equipped Rabbits and Chevettes was wrong. For its part, State Farm expressly acknowledges (Br. 39) that NHTSA's explanation that these higher usage rates were due to the interlock or non-detachability features "may well be true," if the reason that people do not buckle their manual belts is because they object to the belts. But, citing several attitude surveys, State Farm contends (Br. 39-40) that the reason occupants do not wear manual

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not typical of the Nation's automobile fleet, because a combination of owner demographics and driver risk perception ordinarily leads to higher usage rates in small cars; and (ii) the owners of the Rabbits and Chevettes had not been required to purchase a car with the passive belt systems, as purchasers of cars under Standard 208 would be, because the equipment in the Rabbits and Chevettes was optional; this element of voluntarism suggests that the owners might have been predisposed to accept and use the systems (Pet. App. 97a-98a).

Respondents, quoting a study prepared by a NHTSA contractor, contend that NHTSA was wrong in relying on the factor of owner demographics because " '[s]eat belt use is *not* a behavior which is sharply differentiated by traditional demographic and geographic characteristics of the population' " (State Farm Br. 40, quoting F. Newport & V. Tarrance, *National Safety Belt Study* 22 (Sept. 4, 1981) (C.A. App. 1117 (brackets and emphasis added by State Farm)); see also NAII Br. 21 n.25). Respondents fail to note, however, that the same study stressed that there nevertheless "are *some* differences among demographic subgroups" (*ibid.*; emphasis in original). For example, the use of belts by college graduates was found to be 11 percentage points higher than that of the general population, and white collar workers tended to use their belts more often than blue collar workers. The study also confirmed that usage rates are higher in subcompact cars (See C.A. App. 1118)—which include Rabbits and Chevettes.

Respondents take issue (State Farm Br. 41; NAII Br. 21 n.25) with the voluntarism point made by NHTSA by noting that only 5% of the Chevette owners and 12% of the Rabbit owners specifically requested passive belts (see C.A. App. 90). However, a substantial majority of the purchasers—63% in the case of Rabbits and 75% in the case of Chevettes (C.A. App. 1020)—knew that they were buying cars with automatic belts. It was not irrational to conclude that this factor might have played at least some role in belt use in those cars. Respondents' quarrel with NHTSA's reliance on these additional points therefore is without merit.

belts is that such belts take too much time to buckle or that occupants are lazy or forgetful. These factors, State Farm argues, might be overcome by installation of automatic belts, even detachable ones. In a similar vein, NAII argues (Br. 19-21) that the attitude surveys show that although initial resistance to automatic belts might be high, over time occupants might come to accept them.

The attitude surveys respondents cite in fact present a very mixed picture, and in any event, they scarcely compelled NHTSA to retain the passive restraint requirement in Standard 208. For example, State Farm cites (Br. 40) only one portion of a study showing that, in response to a general question asking why people do not wear seat belts, many people volunteered that buckling up takes too much time or that occupants are forgetful (see C.A. App. 1108). However, when the persons surveyed were asked to rank certain specific reasons suggested by the questioner, the fear of being trapped was regarded as a very important factor by more respondents than were the reasons State Farm mentions (*id.* at 1109; see also *id.* at 1151; page 20, *infra*). The fear of being trapped could actually be heightened, not reduced, by installation of passive belts in all vehicles (cf. Pet. App. 110a), which could in turn lead to the widespread detachment of the belts, as NHTSA feared. Moreover, to the extent that occupants are not in the habit of wearing their seat belts, such a habit would not necessarily be fostered through installation of passive belts that could be instantly and permanently detached before the occupants had become used to the systems and, over time, had developed the habit of wearing them.

Other factors that inhibited the wearing of belts likewise might not be significantly overcome by installation of detachable passive belts. Of particular importance is the factor of comfort. See 44 Fed. Reg. 77210, 77211 (1979); C.A. App. 1108. If the detachable passive belts that would be installed under Standard 208 proved uncomfortable, they would probably be detached.[14] It is

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[14] In this connection, respondents cite (NAII Br. 19-20; State Farm Br. 40 n.40) a 1978 survey in which 68% of the respondents

significant to note in this regard that the use of seat belts in the model year 1974 and 1975 cars equipped with mandatory ignition interlocks declined significantly from approximately 75% when the interlock requirement was in effect (44 Fed. Reg. 77211 (1979)), to a rate that was essentially the same as that for all other vehicles by 1978 and 1979 (see C.A. App. 75). Similarly, the use of the detachable passive belts in the Volkswagen Rabbits that were equipped with an interlock system between 1975 and 1979 declined significantly as the cars grew older (*id.* at 77). This experience casts substantial doubt on NAII's assertion that seat belt usage would increase significantly over time as occupants got used to passive belts.

4. Respondents' argument (State Farm Br. 19-38; NAII Br. 38-40) that NHTSA's rescission of the particular version of a passive restraint requirement contained in Standard 208 was arbitrary and capricious because NHTSA did not first sufficiently consider imposing some other version of a passive restraint requirement—one barring compliance by means of detachable belts—has been answered in our opening brief (Gov't Br. 35-40) and the opening brief and reply brief of petitioners Motor Vehicle Manufacturers Association, *et al.* (MVMA Br. 37-45; MVMA Reply Br. 9-19). The complete answer to this contention is that the court of appeals was not em-

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asked to explain why people do not wear seat belts gave an answer that was placed in the category "Bothersome, inconvenient, forgot" (C.A. App. 81). Contrary to NAII's contention, however, this category need not be read to encompass only reactions at the time of entering the car. A passive belt that closed automatically around the occupant could be regarded as "bothersome" or "inconvenient" as the occupant traveled in the car. Moreover, in the succeeding two years when the same question was asked, the percentages of responses placed in this category were 13.9 and 27.3, respectively. Clearly, the 68% figure for 1978 either was an aberration or certain responses embraced by the category in 1978 were placed in other categories in the succeeding years. It appears that the latter possibility was at least part of the explanation. See R. Berger & G. Persinger, Automated Services, Inc., *1980 Survey of Public Perceptions on Highway Safety* at A-5 (Sept. 1980) (prepared for U.S. Dep't of Transportation, NHTSA, Contract No. DOT HS-9-02230).

powered to direct NHTSA to consider these alternative approaches to the occupant restraint problem in any particular order or proceeding (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978)). Because NHTSA thus was not obligated to consider the alternative respondents urge in connection with its decision to rescind the version of the standard that was of doubtful effectiveness, that rescission would not be rendered arbitrary and capricious even if the court were correct that NHTSA had inadequately considered the non-detachable belt alternative. In any event, the reasons given by NHTSA in its decision were more than adequate to explain why the alternative respondents urge was not so obviously meritorious that it should be adopted at that particular time, without the full opportunity for comment on the issue that would be available in a fresh rulemaking proceeding. We offer the following additional points only by way of emphasis:

a. Respondents plainly err in characterizing (NAII Br. 38; State Farm Br. 28) the provision in Standard 208 permitting detachable belts as a "loophole" that could have been closed by a technical amendment of the Standard. In 1974, NHTSA required seat belts to be detachable for the significant safety reason of ensuring a means of emergency exit (39 Fed. Reg. 14593), and NHTSA has continued to permit detachable belts since 1978, when the spool-out alternative also was permitted (43 Fed. Reg. 52493 (1978)). See Gov't Br. 6 n.8; MVMA Br. 43-44. NHTSA determined, moreover, that detachable belts would in fact be installed in the overwhelming majority of new cars under Standard 208. The alternative respondents contend should have been adopted therefore would have constituted a significant departure from prior practice, which might well have necessitated extended proceedings in order to allow for sufficient comment by the industry that would have to alter its plans so drastically. Surely, it was not necessary to retain what respondents acknowledge to be an unsatisfactory passive restraint requirement until that inquiry was complete.

b. State Farm plainly errs in arguing (Br. 20-23) that there was extensive prior experience with non-detachable belts in Rabbits and Chevettes that could have been utilized in amending Standard 208 to bar detachable belts and that therefore made elimination of the detachability feature obvious. Contrary to State Farm's contention, however, the vast majority of those vehicles—more than 300,000 Rabbits and approximately 20,000 Chevettes—in fact were equipped with detachable belts. What distinguishes those belts from the belts that would have been installed to comply with the passive restraint requirement of Standard 208 is that they were accompanied by ignition interlocks that NHTSA is expressly barred by statute from requiring or even permitting as a means of compliance with a passive restraint requirement. 15 U.S.C. 1410b(b)(1); see Gov't Br. 6 n.7. The remaining 13,000 vehicles that had been studied were 1980 Chevettes equipped with spool-release rather than fully detachable belts, without an ignition interlock, and those cars had met with only limited consumer acceptance despite promotional efforts by General Motors. See Gov't Br. 6 n.7. Respondents therefore are urging that NHTSA should have hastily adopted a requirement that never has been tested on a broad scale.

c. State Farm faults (Br. 34) NHTSA for its explanation that it would not require non-detachable belts that could be released by a spool mechanism because of a "widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash" (Pet. App. 110a). State Farm cites a survey reporting that this reason was given by only 7% of the persons asked to explain why people do not wear seat belts (see C.A. App. 1108). But when fear of entrapment was specifically suggested to those responding to the survey, that fear was rated as a "very important" factor by 48% of the respondents, the highest total for *any* response (C.A. App. 1109, 1151). It would have been inappropriate for NHTSA to ignore this concern.

CONCLUSION

For the foregoing reasons and the additional reasons given in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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Solicitor General

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